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In The

Supreme Court of the United States

October Term, 1974

No. 75-192

COMMONWEALTH OF VIRGINIA EX REL.
STATE CORPORATION COMMISSION,
Petitioner,

v.

FARMERS AND MERCHANTS NATIONAL BANK,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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OPINIONS OF THE COURTS BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the district court is not reported. It is set forth in the Appendix, infra, at App. 1.

The opinion and order of the United States District Court for the Western District of Virginia granting defendant's motion for summary judgment and dismissing the case is reported at 380 F.Supp. 568. It is set forth in the Appendix, infra, at App. 3.

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JURISDICTION

Review of the judgment of the United States Court of Appeals for the Fourth Circuit, entered May 5, 1975, is sought. Jurisdiction to review that judgment by writ of certiorari granted is conferred by 28 U.S.C. Section 1254.

STATUTES INVOLVED

12 U.S.C. Section 36(f)

The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. Section 36(c)(1)(2)

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town, or village in which said association is situated, if such establishment and operation are at the time expressly authorized to state banks by the law of the state in question; and (2) at any point within the state in which said association is situated if such establishment and operation are at the time authorized to state banks by the state law of the state in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the laws of the state on state banks.

Section 6.1-39, Code of Virginia

(a) No bank or trust company heretofore or hereafter incorporated under the laws of this State shall be authorized

to engage in business in more than one place except that the State Corporation Commission, when satisfied that public convenience and necessity will thereby be served, may authorize banks having paid-up and unimpaired capital and surplus of fifty thousand dollars or over to establish branches within the limits of the city, town or county in which the parent bank is located or to establish branches elsewhere by merger with banks located in any other county, city or town.

This section shall not be construed to prohibit the operation of existing branch banks heretofore established.

The term "parent bank" shall be construed to mean the bank or banking office at which the principal functions of the bank are conducted. The location of a parent bank or of a branch bank may be moved if the State Corporation Commission determines that public convenience and necessity will be served by such move; but the location of a parent bank or of a branch bank may not be moved beyond the limits of the city, town or county in which it is located except through a merger with another bank.

(b) This section shall be construed to allow the merger of banks and the operation of the merged company of such banks, and to allow the sale of any bank to, and the purchase thereof through merger by, any other bank and the operation of such banks by the merged bank, provided that the State Corporation Commission shall be of the opinion and shall first determine that public convenience and necessity will be served by such operation, and provided further that, at the time of such merger the banks involved shall have been in actual operation for a period of five years or more. But in any case in which the Commission is satisfied that the public interest demands, on account of emergency conditions, that a merger be effected, it may enter an order to

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such effect permitting such merger notwithstanding that the banks involved, or one or more of them, have not been in actual operation for five or more years.

(c) Notwithstanding the limitations of the foregoing paragraph the State Corporation Commission may, when satisfied that public convenience and necessity will thereby be served, authorize the establishment of branch banks in cities contiguous to the county or city in which the parent bank is located, and the establishment of branch banks in counties contiguous to the city in which the parent bank is located. Establishment of such branch may be by merger, consolidation, purchase of assets or creation of a new branch; but if the parent bank is located in a city such branches in the contiguous county may not be established more than five miles outside the city limits.

QUESTION PRESENTED

May a drive-in banking facility, which admittedly performs the functions of a branch bank, and which is located on a separate lot over two hundred feet from the nearest bank office, be deemed not a branch bank, as defined in 12 U.S.C. Section 36(f) and *First National Bank of Plant City, Florida* v. *Dickinson,* 396 U.S. 122 (1969), based on the theory that the facility is an integral part of the bank office?

STATEMENT OF THE CASE

Farmers and Merchants National Bank has its principal office in the city of Winchester, Virginia. In 1969, Farmers and Merchants (F&M) acquired by merger three offices in Front Royal, Warren County, Virginia, a town of fewer than 9,000 people, located roughly twenty miles from Winchester. The three Front Royal offices became branches of

the Winchester bank, with the result that Virginia branching law forbade further F&M branches in Front Royal.[1]

In January, 1974 Farmers and Merchants opened a three-window drive-in facility situated on property across the street and a block away from its Main Street office in Front Royal. Measured diagonally, from property line to property line, the lots are over 200 feet apart. The new drive-in is not connected to the Main Street office, and remains open on Saturday when the Main Street office is closed. It gives F&M conspicuous exposure to traffic on North Royal Avenue, Front Royal's main north-south thoroughfare, by means of a large, lighted, time-temperature advertising sign.

Admittedly, the drive-in functions identically with F&M's two other Front Royal branches. All three are essentially teller operations; they cash checks, receive deposits, open new accounts, and make credit card loans. In addition to the services offered at all other F&M locations in town, the Main Street branch processes and services loans.

Before beginning construction of the drive-in, F&M sought approval from officials with the Comptroller of the Currency. Based solely on two self-serving (and not entirely truthful) letters from F&M, the Deputy Comptroller ruled that, since the proposed facility would constitute an "integral part" of the Main Street branch, "neither approval nor certification of this office is required." (App. 15)

Only when the opening of the new facility was imminent did Virginia's Commissioner of Banking learn of it by way of a complaint. Upon investigation of the situation, the Com-

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[1] Section 6.1-39(a) of the Code of Virginia permits branches "within the limits of the city or county in which the parent bank is located, or—elsewhere by merger with banks located in any other county or city."

Already Farmers and Merchants had expanded into Front Royal by merger, and had at its disposal legitimate methods of branching there; it *chose* the path which is the subject of this litigation.

missioner determined that the facility was a branch, and that it violated Virginia branching law, which is made applicable to national banks by 12 U.S.C. 36(c). When efforts to negotiate a legitimate solution to the problem failed, the Commonwealth tried to enjoin operation of the alleged branch; it sued for injunctive relief in the United States District Court alleging jurisdiction under Sections 1331, 1337, 2201, and 2202 of Title 28, United States Code.

Upon trial of the case the Banking Commissioner averred, and it was not disputed, that, based on consistent policy rulings of the state Bureau of Banking, no state bank would have been permitted to erect such a facility under like circumstances. The Court and the parties recognized and agreed:

(1) that if the facility *were* a branch, it was prohibited by law

(2) that federal law governed whether the facility was a branch

(3) that unquestionably banking functions were performed at the subject facility.

The opinion of the district judge noted the foregoing factors. The Court ruled that the subject facility was not a branch as defined in 12 U.S.C. Section 36(f) and in *Dickinson, supra.* The United States Court of Appeals for the Fourth Circuit affirmed the lower court in a terse, *per curiam* decision.

ARGUMENT FOR GRANTING A WRIT

The judgment of the district court in this case, affirmed by the Fourth Circuit Court of Appeals, should be reviewed and corrected because the error it espouses poses a threat to

the dual banking system in the United States. At stake is the deliberate congressional policy of competitive equality between state and national banking systems.

That policy, i.e., that neither system shall have an advantage over the other as a result of unequal application of branching law, was announced in the McFadden Act of 1927, 44 Stat. 1228, as amended, codified in 12 U.S.C. § 36, and forms the very foundation of this nation's admirably successful dual banking system. The history, significance and purpose of the McFadden Act have been amply reviewed and approved by this Court in *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 385 U.S. 252 (1966) and in *Dickinson, supra.*

Significantly, each of those two cases resulted from efforts by the Comptroller to skirt the McFadden Act mandate. In both instances, this Court's interpretation of the law bolstered the Act, and prevented the attempted evasion of its purpose. The instant case is representative of the Comptroller's latest (since *Dickinson*) assault on competitive equality in branching.

The method selected by Congress for effecting equality in branching is simple: Section 36(c) makes state branching law applicable also to national banks. Section 36(f) defines branch, thereby designating what facilities and activities in both systems shall be subject to branching rules. The scope of the definition in § 36(f) has been the subject of some controversy.

In *Dickinson, supra,* this Court was concerned with the issue, "What is a branch?," in the context of a depository with armored car pick-up service offered by a national bank in Florida, which state permitted no branching. An analysis of the opinion in that leading case reveals clearly the infirmities in the district court's approach to the present case.

Chief Justice Burger, in the majority opinion in *Dickinson,* noted that the power to expand or contract the definition of "branch" was the power to upset congressional purpose, i.e., competitive balance under law.[2] That was the reason Congress defined "branch" itself, he concluded.[3]

The Chief Justice reasoned that state law could not be permitted to widen the coverage of the term "branch," (thereby restricting branching activity). Similarly, we urge that the scope of "branch" must not be narrowed unilaterally by administrative rulings which modify or contradict § 36(f). That would abort the application of branching law in situations where it should come into play.

Dickinson, then, dictates that the threshold question, "Is it a branch?", be subject to a single standard: Section 36(f), as interpreted by this Court. Neither state nor federal agency can be permitted to expand or restrict its meaning. Yet, that is what has occurred in the present case and in other instances[4] where theories like "unity of operation"[5] have been allowed to encroach on the § 36(f) definition.

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[2] "In short, the definition of 'branch' in 36(f) must not be given a restrictive meaning [by influence from outside § 36(f)] which would frustrate the Congressional intent [competitive equality] this Court found to be plain in *Walker Bank, supra.*" (bracketed material added.) 396 U.S. at 134.

[3] "But to allow the states to define the content of the term 'branch' would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in § 36 of a general definition of 'branch.' " 396 U.S. at 133.

[4] *North Davis Bank* v. *First National Bank of Layton,* 457 F.2d 820 (10th Cir. 1972); *Dunn* v. *First National Bank of Cartersville,* 345 F.Supp. 853 (N.D. Ga. 1972); *Michigan National Bank* v. *Saxon,* Civ. No. 821-862 (D. D.C. 1962).

[5] Essentially the same rationale comes in various guises: "unity of operation"; "extension (or expansion) of an existing facility"; "integral part of the main office." All mean the same thing. All are especially useful for justifying a previously-reached result.

This Court in *Dickinson* interpreted and refined § 36(f):

> "Although the definition may not be a model of precision, in part due to its circular aspect, it defines the *minimum* content of the term 'branch'; by use of the word 'include' the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term 'branch bank' *at the very least* includes *any* [emphasis the Court's] place for receiving deposits or paying checks or lending money *apart from the chartered premises;* it may include more." (Emphasis added, except as noted) 396 U.S. at p. 135.

In applying *Dickinson* to the instant case, the key is the addition of the phrase "apart from the chartered premises."[6] By adding that significant phrase this Court said where banking functions cannot be performed (except as branching law permits). We contend that the words "apart from" should be given their plain and ordinary meaning (i.e., separate, not adjoining), especially since the context demands it, and since legal and practical considerations support using the normal rule of construction in this instance.

It is evident that a straightforward view of "apart from the chartered premises" and theories like "unity of operation" are totally at odds, and cannot co-exist. Any number of situations can occur where a facility is both apart from and dependent on an existing bank. Where will the line be drawn? Therefore, to legitimize "unity of operation" is to undermine completely the import of "apart from the chartered premises." That obvious truth was recognized even before *Dickinson,* when "unity of operation"

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[6] It is worthwhile to note Representative McFadden's description of the definitional section of the Act: *"Any place outside of or away from* the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch." 68 Cong. Rec. 5816 (1927). 396 U.S. 134 (Note # 8) (Emphasis added).

was denounced as "too pliable and amorphous"—too nebulous a concept for use where definite guidelines were the rule. *Jackson* v. *First National Bank of Valdosta,* 246 F.Supp. 134, (M.D. Ga. 1965).[7]

It is submitted that the wisdom and correctness of the *Jackson* court was underscored by this Court's opinion in *Dickinson.*

Granted, *Dickinson* dealt primarily with whether a depository performed a banking function. ("Apartness" was not debated, since a mile separated bank and depository.) Nevertheless, the depository/pick-up service *was* totally dependent on the bank office, and operated in unity with it. When the activity in *Dickinson* was struck down as illegal branching, "unity of operation" was impliedly outlawed. On its facts, if not explicitly, *Dickinson* therefore refutes "unity of operation."

To summarize, *Dickinson,* the leading Supreme Court case defining "branch": (1) added the phrase "apart from the chartered premises"; (2) spoke strongly for a single definitional standard not subject to variation from outside influence, and; (3) on its facts tacitly overruled "unity of operation," the very basis of the lower court's judgment herein.

In the instant case, the district judge correctly pinpointed the issue: "whether the facility shall be deemed 'apart from the chartered premises'" (App. 5). But having properly rejected the most unreasonable, most repressive mean-

[7] "This court feels that the concept 'unity of operation' is too pliable and amorphous to be accepted here in support of the position that the disputed 'branch' apparently covered under Section 36(f) is really not a 'branch' but is in effect an 'expansion of an existing facility,' namely, the main banking house of the defendant. We feel that this is consistent not only with the letter of Section 36(c)(1) but also with the spirit of said statute. If in fact an interstice exists in this area of the statute law, this court would not feel justified in filling it with such a nebulous concept as 'unity of operation.' *The history of preserving the balance of competition between the two rival banking systems with some sort of definite guidelines militates strongly against such a position.*" (Emphasis added.) 246 F.Supp. at p. 139.

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ing the phrase "could possibly" have (i.e., not physically attached to the existing office building), the court went astray when it shunned any attempt to interpret the phrase reasonably. Instead, it leaped to embrace an approach based on "relevant factors so as to accord with congressional purpose and common sense."[8] Such an approach, we believe, is fatal to consistent administration of the law, and is contrary to *Dickinson*.

The foregoing error, together with the court's patent failure to realize that banks compete in the realm of customer convenience as well as for territory,[9] suggests what we conceive to be its attitude about the case. It was as if it said, "The economic advantage Farmers and Merchants gained by building this drive-in is slight. It's really not that far away from the bank. Let's see if I can devise some basis for circumventing this 'apart from' language."

The court't rationalization of its conclusion fails, we submit. It purports to rely on common sense and congressional purpose. But common sense ideas of what bank branches do, and ordinary notions of separateness compel the conclusion that this is a branch. The facility in question is just like other F&M branches. Closer; but still separate.

Nor does congressional purpose support the "no branch" finding. The declared purpose of Congress is to maintain

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[8] "A literal and mechanical application of the definition in section 36(f) as construed in *Dickinson, supra* could possibly encompass any free standing structure that performs one of the functions listed in section 36(f). However, it is apparent to this court that the phrase 'apart from the chartered premises' was not intended to be inclusive of all structures not physically attached to an existing office. No court, either before or after the Court's decision in *Dickinson*, has ever wielded this definition in so absolute a fashion; rather, courts have considered all relevant factors so as to accord with congressional purpose and common sense." 380 U.S. 572.

[9] "A bank customer must still drive to approximately the same area now served by the existing branch. Only customer convenience is affected." 380 U.S. 574.

competitive equality. Yet, in the present case, we know, by hypothesis, that a situation of imbalance exists; a national bank has done what a state bank, incontrovertibly, could not do. Congressional purpose already has been thwarted in this instance. Congressional policy gave no answer to the sole issue before the trial court, "Is it a branch?" On that question, Congress furnished only a definition—no more.

Moreover, the district court must forfeit any support it might claim from the policy of competitive equality, because of its patent misconception of the doctrine. Its understanding amounts to saying, simplistically, "if the Bank of Virginia down the block has a drive-in, F&M can have one, too."[10] Competitive equality means equal opportunity to branch under the law; it is not a guarantee that every bank can have facilities equal to his closest competitor's.

The most compelling reason why this Court should grant *certiorari,* and tell what meaning is to be given "apart from the chartered premises," is also a very potent practical reason for its approving definitional uniformity and banning an approach which utilizes "relevant factors" in support of a case-by-case application of the unity of operation rationale. That reason is the urgent need, on the part of state and federal agencies alike, for consistency and predictability in administering (not making) branching law. That is why Congress first set forth a definition of "branch." That is why *Dickinson* declared the single federal standard must govern all cases. If the definition is of uncertain or varying scope, branching law will apply haphazardly. Competitive equality will be destroyed.

We say this not merely because unity of operation is an amorphous concept, subject to being twisted and changed. There are also additional, baffling problems which are in-

[10] This without knowledge as to whether the competitor bank's drive-in was located on adjacent property, (it is), or not. (See App. 8, 9)

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evitably caused by studying "relevant factors" in each individual case. Factors may be weighed differently on different occasions by different courts or administrators. New factors may be added. The present case illustrates the latter point perfectly: when the factors enumerated in previous cases favored finding a branch, the district court manufactured two brand new factors, which (combined) amounted to its saying, "F&M did the best they could to put the drive-in close to the bank."[11] We submit that a consistently fair reading of an already clear definition is vastly preferable to such wandering among "factors."

The jurisdictions are divided now on the issue herein. On one hand, the middle district of Georgia rejects unity of operation in *Jackson, supra;* however, the northern district of Georgia, the Tenth Circuit, and now the Fourth Circuit have adopted that approach. Many jurisdictions have not yet ruled on the question. Under these circumstances, review of the instant case by this Court is essential in any event.

We strenuously urge that the decision of the district court herein, affirmed by the Fourth Circuit, conflicts with an applicable decision by this Court in *Dickinson.* If that is true, the error needs correction, and reversal should be ordered.

Even if the district court is correct, and unity of operation based on "relevant factors" is a legally permissible *ratio decidendi,* a clarification by this Court, binding on all regulators, is demanded to restore competitive equality and to permit some semblance of consistent and predictable

[11] "Other factors this court has considered relevant to this case are (1) whether it was feasible for an existing bank office to physically attach the drive-in windows to the existing office, and (2) whether the freestanding facility could have been constructed closer to the existing bank office." 380 F.Supp. at p. 574.

Actually, the evidence herein failed to show any bona fide effort by Farmers and Merchants to obtain any one of several closer lots.

administration of bank branching law. It was regulatory disagreement over the meaning of this Court's phraseology which spawned the present controversy; this Court alone can put the issue to rest.

If further justification for review be required, it lies in this Court's power of supervision to correct departures from the accepted and usual course of judicial proceedings. This power should be exercised herein to overturn: (1) the district court's conspicuous misconception of the doctrine of competitive equality; (2) its unwarranted (though disclaimed) reliance on the findings of the Comptroller in the face of binding Fourth Circuit authority[12] that such reliance is forbidden, which authority had been advanced in argument; and (3) the trial judge's announced intention to find in favor of the defendant, if possible. All three of these errors were sanctioned by the court of appeals.

This Court should make the law at issue in this case; the matter is too broad and too important to be the subject of law made by the Comptroller, and ratified by the lower courts. In 1966 (*Walker Bank*) and 1969 (*Dickinson*) this Court refused to allow the Comptroller's rulings to thwart the purpose of the McFadden Act. We earnestly beseech that the Court now reaffirm its commitment to preserving that Act's congressional goal.

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[12] *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F.2d 267 (4th Cir. 1965). Noting that, as here, those controverting the Comptroller's ruling had been given no opportunity to be heard by that official, the court ruled: "Hence, there is no place in the review for an opening presumption of correctness of any fact which it may appear to the Court was adopted by the Comptroller for decision." 352 F.2d at p. 272. But see App. 12.

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CONCLUSION

For the reasons stated, a writ of *certiorari* should be granted.

Respectfully submitted,

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